FILED
OCT 18 1961
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS,
INCORPORATED and
THE TRAVELERS INSURANCE COMPANY,
Respondents,

EXTRAORDINARY PETITION FOR REHEARING

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

INDEX

	Page
Report of Decision	1
Statement	2
Reasons for Granting Rehearing	
I. The Requirements of Rule 58(4) Should be Waived	3
II. The Fifth Circuit Misinterpreted Administrative Procedure Act	4
III. Gondeck conflicts with Ecker	6
IV. Gondeck conflicts with Smith	7
Certificate of Good Faith	9
Certificate of Service	9

AUTHORITIES

STATUTES CITED

	Page
Defense Bases Act, 42 U.S.C. 1651	1
Longshoremen's Act, 33 U.S.C. 922	3
Administrative Procedure Act, 5 U.S.C. 1001	5,6

RULES CITED

Rule 58, Supreme Court Revised Rules	2,3

CASES CITED

United States v. Ohio Power Co. 353 U.S. 98	2,4
Ecker's Case, 327 F.2d 1003, Reversed, 33 L. Week 3317, 3320	2,3,6
Smith's Case, 335 F.2d 70, cert. denied, 33 L. Week 3322	3,7,8
Rose's Case, 338 F.2d 319, cert. denied, 33 L. Week 3322	3,7
Cardillo v. Liberty Mutual, 330 U.S. 469	5
O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS INCORPORATED and
THE TRAVELERS INSURANCE COMPANY,
Respondents,

EXTRAORDINARY PETITION FOR REHEARING

REPORT OF THE DECISION IN THIS CASE.

This case is reported at 299 F.2d 74, cert. denied, 370 U.S. 918, rehearing denied, 371 U.S. 856 (Oct. 1962).

STATEMENT

COMES NOW the Petitioner JEANETTE B. GONDECK, by and through her undersigned attorney, and moves the Court to grant her rehearing on her Petition for Writ of Certiorari to the United States Court of

Appeals for the Fifth Circuit to review its judgment affirming the United States District Court for the Southern District of Florida, which set aside the award of the Deputy Commissioner for the Sixth Compensation District awarding benefits for the death of her husband pursuant to the Defense Bases Compensation Act, Title 42 U.S.C., Section 1651. The Petitioner moves the Court to waive the provisions for finality of litigation as set forth in Rule 58(4), of this Court's Revised Rules, and prays the Court to apply the rule herein as established in **United States v. Ohio Power Co.**, 353 U.S. 98 (1957).

For good cause for granting rehearing herein, the Petitioner will show unto the Court:

1.) That there have occurred intervening circumstances of substantial and controlling effect.

2.) This Court on March 29, 1965, granted a petition for certiorari to the United States Court of Appeals for the Fifth Circuit and reversed the decision of that Court on the same issues presented in this cause, establishing that the Petition herein was well-taken. **O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc., (Ecker's case)** No. 307, 33 L. Week 3317 (March 29, 1965), reversing, 327 F.2d 1003.

3.) The United States Court of Appeals for the Fourth Circuit has now considered Smith's case, Gondeck's companion, who was also killed in the same accident, and affirmed the award of compensation benefits to Mrs. Smith, and further expressed disagreement with the decision of the Fifth Circuit in the Gondeck

case. This Court denied employer's petition for certiorari, **Pan American World Airways v. O'Hearne**, 335 F.2d 70 (4th Cir. 1964), cert. denied, 33 L.Week 3322 (March 29, 1965), No. 474.

4.) The Fifth Circuit has apparently, by an entirely different panel, rejected the holdings in the Gondeck case. **O'Keeffe v. Pan American World Airways, (Rose's case)**, 338 F.2d 319 (5th Cir. 1964), cert. denied, 33 L.Week 3322 (March 29, 1965) No. 852.

5. The cause herein has not been irrevocably closed in that no motion has ever been presented to the District Court to implement the mandates of this Court or of the Court of Appeals, nor has the Deputy Commissioner ever entered an order rejecting the claim for compensation, thereby tolling the commencement of the running of the time for a petition to the Deputy Commissioner for review and modification. Title 33 U.S.C., Section 922.

REASONS FOR GRANTING REHEARING

I

The Requirements Of Rule 58(4) Should Be Waived In The Interest Of Justice

Rule 58(4), of this Court's Revised Rules, should be waived in the interests of justice.

This Court has established sufficient precedent for such waiver where relief of an obvious injustice can be corrected only in this Court. **United States v. Ohio Power Company**, 353 U.S. 98 (1957):

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our judgments, both in civil and criminal cases." 353 U.S. 98, 99.

Five workers were in the jeep when the accident occurred. One native, who was killed, is not covered by this Act. Of the other four, compensation benefits have been awarded to or on behalf of three; only Mrs. Gondeck and here daughter have been deprived of compensation.

In addition to the gross injustice of the denial of benefits to the survivors of Frank Gondeck, there is the uncertainty of uniformity, now existing between the Fifth Circuit and the Fourth Circuit, which only this Court can resolve:

> "If there is to be uniformity in the application of principles announced in those two companion cases, the judgment below in the instant case cannot stand." 353 U.S. 98.

II

The Fifth Circuit Misinterpreted Its Functions Pursuant to the Administrative Procedure Act.

Both the Ecker and Gondeck cases were submitted to Deputy Commissioner O'Keeffe on stipulated facts. The Fifth Circuit rejected his inferences, findings and

conclusions in both cases, holding that it could overrule the findings that reasonable recreation after hours is an incident of employment.

Under the Administrative Procedure Act, 5 U.S.C.A. §§ 1001-1011, this finding should be final as a reasonable inference from stipulated facts. This Court so held in Ecker's case, and specifically overruled the Fifth Circuit's concept of its functions under the Act.

Relying on **Cardillo v. Liberty Mutual Ins. Co.**, 330 U.S. 469, 477-478; **O'Leary v. Brown-Pacific-Maxon, Inc.**, 340 U.S. 504, 507-508, this Court said at 33 L.Week 3320:

> "The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

In summarizing the applicability of the Administrative Procedure Act, this Court added:

> "The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner, are to be accepted unless they are irrational or unsupported by substantial evidence on the record as a whole."

III

The Opinion Of The Fifth Circuit Is In Direct Conflict With This Court's Decision In Ecker's Case.

This Court in the Ecker case on March 29, 1965, resolved the two very issues proposed by the Petitioner herein, in her Petition: the substantive rights of off-shore defense base workers who are injured while seeking reasonable recreation in their limited areas of danger, and the scope of judicial review from the orders of deputy commissioners in compensation cases under the Administrative Procedure Act.

Both issues were resolved by this Court contrary to the result reached by the Fifth Circuit in both these cases, but leaves Mrs. Gondeck without redress. Because of the denial of her petition for review, the "law of her case" is now established, even though contrary to later pronouncements by this Court of different law.

The Ecker case was submitted to Deputy Commissioner William M. O'Keeffe on stipulated facts, as was the Gondeck case. He awarded benefits to each of the widows. In the four cases decided contemporaneously with each other on these very same points, three have now been resolved in favor of the widows, and only Mrs. Gondeck and her daughter stand without redress.

As held in the Ecker case, at 33 L.Week 3320 and apparently rejecting the Fifth Circuit's holding that Gondeck's going to town was not on the employer's business, nor to its benefit, this Court stated the general rule:

> "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer."

IV

The Fifth Circuit's Attempt To Distinguish This Case From Rose's Case Conflicts With The Fourth Circuit In Smith's Case.

The Fifth Circuit, by an entirely different panel, decided **Rose's case**, 338 F.2d 319, and attempted to distinguish it from its Gondeck opinion. The two principal distinctions noted are, (1) Rose had actually been called on emergency, whereas the Gondeck record did not reflect that Gondeck had (although the Deputy Commissioner found, based on stipulated facts, and company rule, that he was subject to 24-hour, seven-day-a-week call), and, (2) Gondeck had violated a company rule, but Rose had not.

Both these holdings were in direct conflict with those of the Fourth Circuit in **Smith's Case**, 335 F.2d 70.

Smith was Gondeck's companion. He was one of the men in charge of the jeep, who had actually been told that the jeep could not be used for private purposes (by stipulated facts). By further stipulation, it was agreed that Gondeck had never been notified of this company rule. Smith was subject to the same hours and call as was Gondeck.

However, the Fourth Circuit apparently did not consider these points controlling, because Smith knowingly (according to stipulated facts) violated the company rule that resulted in his death, whereas, Gondeck's violation, if any, was without knowledge. Nothing in the Longshoremen's and Harbor Workers Compensation Act makes

such violation a ground to deprive a widow and her daughter of their benefits, and the Fifth Circuit's attempted distinctions are as invalid as the Fourth Circuit found in Smith's case, where it was held:

> "The death of Smith's companion, Gondeck, was the subject of **United States v. Pan American World Airways, Inc.**, 299 F.2d 74 (5th Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome."

While we realize that there were actually differences of vital testimony by the same supervisors in both the Smith and Gondeck cases, the least that should be done is to have the case remanded to the Deputy Commissioner for the taking of further testimony to resolve the conflicts of testimony.

The Fifth Circuit's ruling in this case, that compensation should not be awarded for injury and death suffered during recreation not supervised or organized by the employer, from which the employer receives no direct benefit, has been overruled by this Court in Ecker's case. In addition, the Fifth Circuit's holding that the courts have authority to review inferences drawn from stipulated testimony, is also overruled. However, these rulings are general, but cannot change a later consideration of this case.

The Fifth Circuit has held that however innocent a worker may be in violating an undisclosed regulation, he may not recover compensation, and reiterated its

holding in **Rose's case**, supra. The Fourth Circuit has held that there is no statutory provision to sustain such a denial of an award.

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay in the final determination of the cause. I further certify that the Petition is restricted to the grounds set forth, the intervention of circumstances of substantial and controlling effect, and other substantial grounds not previously presented.

ARTHUR ROTH

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon this ____day of April, 1965.

ARTHUR ROTH